SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS.

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MOTION TO DISMISS.

Appellees move, pursuant to Rule 16(b), that the appeal from the final judgment of the Supreme Court of Errors be dismissed on the grounds that the federal question sought to be reviewed was (a) not timely or properly raised, and (b) not expressly passed upon either by the Supreme Court of Errors or the Court of Common Pleas.

OPINION BELOW.

The opinion of the Supreme Court of Errors is reported at 181 A2d 601 and is also found in Appendix A of the Jurisdictional Statement. The opin-

ion of the Court of Common Pleas is not reported but is found in Appendix C of the Jurisdictional Statement.

JURISDICTION.

The final judgment of the Supreme Court of Errors of Connecticut was filed on May 8, 1962. After timely Motion for Reargument, notice of appeal was filed by the appellant on August 1, 1962. The jurisdiction of this Court is sought to be involved under 28 U.S.C. §1257(2) and 28 U.S.C. §2101 (c).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED.

The appellant has set forth at pages 2-3 of its Jurisdictional Statement the three questions it seeks to present to this Court on appeal.

STATEMENT OF THE CASE.

The first two paragraphs of the opinion of the Connecticut Supreme Court sets forth the factual background as follows:

> "King, J. The defendant was tried on a criminal information charging it, in five counts, with certain violations of municipal regulations of the Town of Stratford. It was found guilty, under the first count, of permitting its dwelling units to be occupied by rent-paying tenants without its having obtained proper certificates of

occupancy as required by Stratford's regulations, and, under the third count, of failing to provide noncombustible flooring under the furnaces in fifty-four of its dwelling units as required by the Stratford building code. It was found not guilty of the offenses charged in the second count, and the fourth and fifth counts were withdrawn.

"The facts necessary for an understanding of our decision concerning most of the claims of error properly before us will now be summarized. On August 1, 1941, the United States government, hereinafter referred to as the government, condemned land in Stratford and began the construction of housing units under the provisions of the Lanham Act, 54 Stat. 1125, as amended, 42 U.S.C. §1521. The units were constructed under the supervisions of the Bridgeport Housing Authority and were operated for the government by that authority until June 30, 1943, when the newly established Stratford housing authority took over the operation under a lease from the government, pursuant to federal regulations, and operated the units until January 17, 1956. During this entire period of construction and operation by the government through the agency of the housing authorities, no certificates of occupancy for the housing units were ever obtained, nor did the construction fully conform to the requirements of the building code of Stratford. On January 17, 1956, the government sold the entire project to Stonybrook Gardens, Inc., a private corporation. Two hundred thousand dollars was paid on the purchase price, and a mortgage on the property

was given to the government as security for the balance. Thereafter, on the same day, Stonybrook Gardens, Inc., conveyed the property to Hyman Alpert and Joseph Alpert; on January 10, 1957, they conveyed it to the defendant. Both Stonybrook Gardens, Inc. and the defendant are corporations owned by the Alperts. Before the housing units were sold by the government to Stonybrook Gardens, Inc., the Alperts met with the building inspector of Stratford and were put on notice as to the violations of the building code. At that meeting, the Alperts said that these violations would be taken care of. The violations had been noted by the building inspector when he made an inspection of the housing units in January, 1955. A copy of this inspection report was given to the Alperts before the units were purchased by them. Fifty-four furnaces in the units did not, at the commencement of the present prosecution, have noncombustible floors, as required by the building code. No certificates of occupancy had been obtained. Private owners are required by §206 of the building code of Stratford to obtain certificates of occupancy and by §3707 to have noncombustible floors under the furnaces of housing units such as these. The government admittedly was not bound by these provisions, since an express provision in the Lanham Act empowered the government to construct buildings under the act 'without regard to . . . State, or municipal laws, ordinances, rules or regulations.' 54 Stat. 1126, 42 U.S.C. §1521(b)."

Further, the 1925 Stratford Building Code, as

amended in 1932, contained provisions virtually identical to the 1943 Code insofar as the applicable provisions involved in the present case are concerned.

The Connecticut Supreme Court of Errors upheld the conviction of the defendant-appellant in a unanimous decision.

ARGUMENT:

I.

Questions 2 and 3 Sought to be Presented by the Appellant Were Neither Raised in its Appeal to the Connecticut Supreme Court of Errors Nor Expressly Passed Upon by the Connecticut Court.

Under Connecticut Practice, error is not to be considered by the Supreme Court unless it is specifically assigned on appeal.

> "Errors considered. This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial."
>
> **Connecticut Practice Act**, 1951 Rev., §409.

The principle has been followed in innumerable cases by the Supreme Court of Errors. See **Maggi v.**

Mendillo, 147 Conn. 663, 670 (1961) and cases cited therein.

The assignment of errors made by the appellant as well as the pertinent provisions of the Finding referred to therein, are set forth in Appendix "A" to this motion. Nowhere is mention made of the claims now advanced in Questions 2 and 3 of the Jurisdictional Statement.

It is a basic principle of appellate procedure, in this court as well as the Connecticut Court, that issues and claims of law must be clearly and timely presented in the lower courts if review on appeal is to be sought. An analysis of the opinions of the Court of Common Pleas, the Supreme Court of Errors and the appellant's assignment of errors will disclose that the following were its only claims of law pursued diligently and properly:

1. Since the government has retained legal title under a mortgage deed executed by Stonybrook Gardens, Inc., the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution.

2. The use and occupancy of the housing units was legal at the time of the passage of the present building code in 1943, within the meaning of §502 of the code.

3. The prosecution was barred by laches and estoppel.

These were the only claims properly raised and

expressly passed upon by the Supreme Court of Errors, as is apparent from a reading of the opinion.

The first claim of the appellant will be treated hereinafter.

Questions 2 and 3 were never considered by either of the Connecticut Courts and were never raised by the appellant until its Motion for Reargument.

The appellant's second claim concerns the interpretation of a municipal ordinance. The construction of the Connecticut Supreme Court of Errors upon Section 502 of the Stratford Building Code is binding upon this Court. **Poulos v. New Hampshire,** 345 U.S. 395, 402 (1953). No claim was advanced by the appellant that such an interpretation would violate the federal constitution until after the decision of the Connecticut Supreme Court of Errors was announced. Therefore, its present claim was never considered by the lower court.

Admittedly the issues of laches and estoppel are not subjects of this appeal.

Therefore, the appellee respectfully submits that Questions 2 and 3 of the appellant's appeal:

(a) are neither timely nor properly presented, and

(b) were not expressly passed upon by the Connecticut Supreme Court of Errors.

II.

The Provisions of 28 U.S.C. §1257(2) are Not Applicable in This Appeal Insofar as the Interpretation of the Lanham Act (54 Stat. 1125, as amended, 42 U.S.C. §1521) is Concerned.

The first question presented by the appellant is solely concerned with the interpretation of the meaning and intent of the Lanham Act by the Connecticut Supreme Court of Errors. Essentially, the appellant claims that the intent of the Lanham Act is to shield a private purchaser from local regulations. The Connecticut court has interpreted the Lanham Act thusly:

> "The sovereignty of the United States and its attendant immunity from state and local regulations ended with its sale of the property. See **S.R.A., Inc. v. Minnesota,** 327 U.S. 558, 564, 66 S. Ct. 749, 90 L. Ed. 851. There is nothing in the Lanham Act indicative of a congressional intent that a private purchaser of federal housing is to be shielded by federal immunity from reasonable local regulations designed to protect the public safety. See **Public Housing Administration v. Bristol Township,** 146 F. Sup. 859, 863 (E.D. Pa). Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to invalidate state or local rules for the protection of the public safety unless its purpose so to do is clearly stated. Id., 864, and cases cited. The act neither purports to, nor does, confer any authority on one in the

position of the defendant, or on anyone other than the government or one acting in its behalf, to ignore, or fail to comply with, the provisions of a local building code. Of course, under the circumstances, no such authority is conferred by the federal constitution." Jurisdictional Statement, Appendix A; P. 30; **State v. Stonybrook, Inc.,** 181 A2d 601.

What is involved then, is not an issue to be presented on a direct appeal to this Court, but rather one to be raised on a petition for certiorari. The question does not involve the application of the Stratford building code in a manner repugnant to the Lanham Act, but only a construction as to the meaning and intent of the Lanham Act.

A corollary question was the retention of a security interest in the property by way of a mortgage deed by the federal government. It is respectfully submitted that this question has been determined by **S.R.A., Inc. v. Minnesota,** 327 U.S. 558 (1945).

CONCLUSION.

Wherefore, the Appellee submits that the motion to dismiss the appeal be granted.

Respectfully submitted,

JAMES J. O'CONNELL,

THOMAS J. DOLAN,

Attorneys for the Appellee.

APPENDIX A

ASSIGNMENT OF ERRORS.

Now comes defendant-appellant, by its attorney, and respectfully alleges that the Court erred:

A.

Errors Apparent On The Face Of The Record.

1. In finding defendant guilty and imposing a fine of $2,270.00 under the First and Third Counts of the Information.

2. In that the First Count does not warrant a judgment of guilty thereunder, because:

(a) The use and occupancy of the buildings of Stonybrook Gardens by defendant, as further referred to in paragraphs 6, 7 and 8 of the Court's findings of December 28, 1960, is a legal, pre-existing, non-conforming use of that property, and the buildings thereof are not in violation of Sections 206, 3707, or any other provision of the Building Code or the Plumbing Code of the Town of Stratford.

(b) The buildings of Stonybrook Gardens, used, owned and occupied by the defendant or its representatives, were "buildings in existence" before the enactment of the 1943 Building Code, within the meaning of Sections 104 and 502 of that Code, and therefore are not buildings for which Certificates of Occupancy are required under Section 206 thereof, as charged in the

First Count of the Information under which defendant was found guilty, as stated in paragraph 29 of the Court's findings.

(c) The use and occupancy of the buildings of Stonybrook Gardens, on the part of the defendant was not a change of use and occupancy requiring a Certificate of Occupancy under Section 207 of the Stratford Building Code of October 27, 1943.

3. In that the Third Count does not warrant the judgment of guilty thereunder, because:

(a) The State has not sustained its burden of proof in establishing defendant's guilt of the 54 violations found thereunder as stated in paragraph 30 of the Court's findings.

(b) The requirements of Section 3707 of the Building Code of the Town of Stratford with regard to the construction of furnace rooms do not apply to the buildings in Stonybrook Gardens, inasmuch as such buildings were "buildings in existence" as of the effective date of the 1943 Building Code, within the meaning of Section 502 thereof, and such furnace rooms have not been changed in construction subsequent to their original construction in 1942 by the United States, defendant's predecessor in title.

(c) Defendant had secured building permits for the repair of furnace rooms in Stonybrook Gardens, which permits had not been revoked prior to the institution of the Information against it.

4. In that the violations alleged in the First and Third Counts of the Information, under which the defendant was found guilty, as stated in paragraphs 29, 30, 32 of the Court's findings, are barred by the statute of limitations and laches.

5. In overruling defendant's contentions of law, as set forth in paragraphs 1 through 6 respectively of the Fourth Part of defendant's draft findings, filed with the Court on April 20, 1959.

6. In overruling defendant's motion for re-argument, as identified and referred to in paragraph 39 of the Court's findings.

B.

Errors In The Conduct Of The Trial By The Court.

1. In refusing to find the facts set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the First Section of defendant's draft findings of April 20, 1959.

2. In finding the facts set forth in paragraphs 13, 14, 15, 16, 17, 20, 22, 23, 24, 25, 26 and 28 of the Court's findings of December 28, 1960, which findings are without evidence to sustain them; and for the further reason that Stonybrook Gardens is a legal, pre-existing, non-conforming use, the buildings of which all were constructed prior to the enactment of the Building Code of October 27, 1943, and to which property and buildings provisions or requirements of the Building Code and the Plumbing Code of the Town of Stratford are not applicable in the manner found by the Court in paragraphs 9, 10, 11,

12, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27 and 28 of its findings of December 28, 1960.

3. In adopting the conclusions of law set forth in paragraphs 29, 30 and 32 of the aforesaid findings of the Court.

4. In refusing to strike or dismiss the Third Count of the Information, upon defendant's motion made for that purpose on the ground that no foundation had been laid for a finding of guilty under that Count, in that any building units of Stonybrook Gardens which did not have cement furnace floors were not properly identified.

5. In admitting the testimony of George Wright, a witness for the State, whose testimony in its entirety was immaterial, hearsay and extremely prejudicial in nature.

Respectfully submitted,

HUGH A. HOYT,
Attorney for Defendant.

*See part 4 of finding.

Filed Jan. 12, 1961.

FINDING.

FOURTH.

The defendant made the following claims of law upon which the court ruled as hereinafter stated:

34. The defendant claimed that Stonybrook Gardens, by reason of the Constitution of the United

States and the provisions of the Lanham Act, did not have to comply with the Building Code of the Town of Stratford, while owned by the United States and thus constituted a legal use of the buildings and property during the period of Government ownership even though the conditions found by the Court to be violations of the Building Code were then in existence, that the change of ownership upon sale by the United States did not constitute a change of use of occupancy and that the use and occupancy of the property has not otherwise changed or substantially altered since title was transferred on January 17, 1956, and consequently that the buildings are not in violation of the Building Code since they constituted a legal existing use of the property when the Building Code first became effective with respect to the property.

35. The defendant claimed that the requirement of certificates of occupancy by section 206 of the Building Code of the Town of Stratford does not apply to buildings in existence as of the effective date of the Code, that the buildings in Stonybrook Gardens were in existence as of the effective date of the Code, that the use of the buildings was a legal use as of the effective date of the Code and has not since been changed, and therefore that the failure of defendant to obtain certificates of occupancy is not a violation of the Building Code.

36. The defendant claimed that the requirements of section 3707 of the Building Code of the Town of Stratford with regard to the construction of furnace rooms do not apply to buildings in existence as of the effective date of the Code, that the buildings in

Stonybrook Gardens were in existence as of the effective date of the Code, and that therefore the furnace rooms are not in violation of section 3707 insofar as they have not been changed since constructed by the United States and sold to the defendant or its predecessor in title.

37. The defendant claimed that to the extent that the furnace rooms had not been reconstructed so as to meet all of the requirements of the Code, work was in progress to effect such reconstruction under a building permit that had not been revoked or voided and which work had not been subjected to a stop work order by the Building Inspector, and therefore that none of the furnace rooms were in violation of section 3707 of the Building Code of the Town of Stratford even if compliance therewith is required.

38. The defendant claimed that the prosecution is barred by the statute of limitations or by laches.

39. The defendant claimed, in a motion for reargument, that even if certificates of occupancy are required by section 206 of the Building Code of the Town of Stratford with respect to Stonybrook Gardens, not more than 197 certificates are necessary as there are only 197 buildings and thus that not more than 197, rather than 400 as charged and found, violations of the section could exist.

Notwithstanding these claims the court overruled the same and rendered judgment as on file.